LEGAL ANALYSIS OF THE GOVERNMENT OF SOUTH AFRICA COMPLIANCE WITH THE CONDITIONS IN THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 FOR TERMINATING SANCTIONS

SUMMARY

Section 311 of the Comprehensive Anti-Apartheid Act of 1986, P.L. 99-440, approved October 2, 1986 (the CAAA), provides that Title III, section 501(c), and section 504(b) "shall terminate" if the Government of South Africa takes t following steps: (1) releases all persons persecuted for t political beliefs or detained unduly without trial and Nels Mandela from prison; (2) repeals the state of emergency in effect on the date of enactment of this Act and releases al detainees held under such state of emergency; (3) unbans democratic political parties and permits the free exercise South Africans of all races of the right to form political parties, express political opinions, and otherwise partici in the political process; (4) repeals the Group Areas Act a the Population Registration Act and institutes no other measures with the same purposes; and (5) agrees to enter in good faith negotiations with truly representative members o the black majority without preconditions. (For the full te of section 311, see Attachment 1.) For the following reas we believe the South African Government has met each of the conditions.

THE REQUIREMENTS OF SECTION 311(a)

1. Section 311(a)(1)(released "all persons persecuted f their political beliefs or detained unduly without tri and Nelson Mandela from prison")

At the outset, it should be noted the Government relea Nelson Mandela from prison on February 11, 1990, satisfyin part the condition in section 311(a)(1). Subsequently, th release of all political prisoners in South Africa has proceeded under the Pretoria Minute of August 6, 1990. The Pretoria Minute provides for the release not only of perso who are prosecuted or detained for exercising rights of expression or association but also of those who with polit motivation committed, threatened to commit, or conspired t commit acts of violence against persons or property that a proportionate to their political objective. The release o prisoners before the conclusion of the Pretoria Minute, together with the implementation of the Pretoria Minute an SAG's release of prisoners not covered by the Pretoria Min has resulted in the release of over 1000 prisoners.

This release of prisoners has permitted the Government to satisfy -- indeed, even exceed -- the narrower requirements of section 311(a)(1). Although the terms used in section 311(a)(1) are not defined in the CAAA, they are consistent with the standard the U.S. has employed in evaluating human rights practices worldwide, which excludes persons incarcerated after receiving due process for committing crimes of violence or under laws which are not otherwise in conflict with international human rights standards, even if the offense was politically motivated. Thus, in effecting the release of many who have committed acts of violence, the Pretoria Minute generally exceeds our human rights reporting standards.

Interpreting section 311(a)(1) not to require the release of persons who have committed crimes of violence is amply supported by the text and legislative history of the CAAA. Throughout the Act, the Congress explicitly condemned violence as a method of advancing political change in South Africa. For example, section 102(a) states that U.S. policy toward the ANC "shall be designed to bring about a suspension of violence that will lead to the start of negotiations ..." Section 311(c) also states that if the Government agrees to negotiations but the ANC, PAC or other organizations "refuse to abandon unprovoked violence during such negotiations," the U.S. "will support negotiations which do not include these organizations." Similarly, in discussing the question of "political prisoners," Senator Moynahan suggested the limited scope the Congress intended to impart to this term: "The U.S. deplores the detention of persons whose only act is outspoken opposition to the system of apartheid. [The South African Government has] a system of political laws, which are designed to stifle and intimidate political opposition, laws which make criminal acts which are not criminal in any free society." 132 Congressional Record S11867 (daily ed. August 15, 1986).

It should also be noted that the prisoners and detainees covered by section 311(a)(1) includes only those persons over whom the Government exercises direct power of control. At the stage in the negotiating process contemplated by section 311(a), this does not include prisoners and detainees held by the authorities in the so-called "independent" homelands of Transkei, Ciskei, Bopuhthatswana and Venda. (For a detailed analysis of this question, see Attachment 2.) Briefly, the conditions for lifting sanctions do not include the reincorporation of these homelands into South Africa. This is an issue the legislative history of the CAAA suggests would be resolved as part of a final constitutional settlement resulting

from the negotiations section 311(a) was intended to encourage. Moreover, the express savings clause in section 605 of the CAAA that "[n]othing in this Act shall be construed as constituting any recognition by the United States of the homelands referred to in this Act," blunts any argument that treating the "independent" homelands differently from the rest of South Africa for purposes of section 311(a) is inconsistent with U.S. policy of non-recognition of the homelands.

Based on the legal guidance described above, our Embassy has now concluded that the Government has "released all persons persecuted for their political beliefs or detained unduly without trial." (Attachment 3) After having been given complete access to SAG records and to individuals involved in the review of cases under the Pretoria Minute, the Embassy exhaustively reviewed cases of incarcerated or otherwise detained prisoners over whom the Government has direct control.

The Embassy's report concludes that the Government has released all prisoners and detainees covered by section 311(a)(1) -- whether under the Internal Security Act, regulations applicable to "Unrest Areas" declared pursuant to the Public Safety Act, or any other provision of South African law. It also states that recent amendments to the Internal Security Act will set an absolute limit of 10 days to detention without approval of a South African judge and will generally provide for access by relatives and legal representatives of the detainee. With respect to Unrest Areas, detentions will be authorized for up to 30 days, subject to judicial review at any time. Finally, the Embassy also notes that with respect to persons who are in custody pending trial, amendments of South African law unbanning organizations and permitting free political activity, the procedures in place for granting indemnity pursuant to the Pretoria Minute, and the necessary involvement of a member of the South African judiciary in any criminal trial provide assurances that there will be no convictions in the foreseeable future for offenses constituting "persecution for political beliefs" within the meaning of section 311(a)(1).

The Embassy's conclusion is buttressed by the independent assessment of key officials of the ICRC, the South African Human Rights Commission (HRC), and the South African Lawyers for Human Rights (LHR), each of which privately agree that there are probably no remaining "political prisoners," as defined by the CAAA. (Attachment 4) However, because these organizations are actively involved in assisting the Government

and ANC resolve their disputes over the implementation of the Pretoria Minute, they would not wish to confirm publicly what they have told us privately, and we understand the Department would not wish to undercut their position with the ANC by publicly relying on their views to corroborate our own independent conclusions.

In sum, based on the Embassy's recommendation and all other available information, we believe there is clear and convincing evidence the Government has released "all persons persecuted for their political beliefs or detained unduly without trial and Nelson Mandela from prison," within the meaning of section 311(a)(1) of the CAAA.

2. Section 311(a)(2)("repeals the state of emergency in effect on the date of enactment of the CAAA and releases all detainees held under such state of emergency").

In June 1990, the Government lifted the State of Emergency everywhere except in Natal. In October 1990, the State of Emergency in Natal was lifted as well. The South African Human Rights Commission has confirmed that no detainees are now held under the state of emergency.

3. Section 311(a)(3)("unbans democratic political parties and permits the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process")

After President de Klerk's speech to Parliament on February 2, 1990, the Government unbanned all political parties. Since then, South Africans of all races have freely exercised the right to form political parties (including the ANC, PAC, AZAPO and SACP), express political opinions, and participate in the political process, which is currently focussed on negotiating a new constitution for a non-racial democracy in South Africa. To give only one example, the ANC is openly advancing its views in the press, holding its own party congresses, and organizing rallies. Nelson Mandela has traveled throughout South Africa and throughout the world to advance the ANC's views.

4. Section 311(a)(4)("repeals the Group Areas Act and the Population Registration Act and institutes no measures with the same purposes")

The Government of South Africa has repealed the Population Registration Act and the Group Areas Act. The limited transitional measures adopted in the repeal measures to maintain the existing constitution pending implementation of a

new constitution do not constitute "measures with the same purposes" as the GAA or the PRA. (For a detailed analysis, see Attachment 5.)

Briefly, the purpose of the GAA was to limit rights to occupy or own land on the basis of race. In repealing the GAA, the SAG adopted measures that would retain for purposes of other laws that are unrelated to ownership or occupation of land, references to areas designated as "Group Areas" pursuant to the GAA, and would allow municipalities to adopt racially non-discriminatory residential "norms and standards." In permitting the continued use of references to Group Areas, the measures would not deny any person the right to reside in or own land based on race. Similarly, "norms and standards" regulations, which are analogous to zoning, would not deny any person the right to reside in or own land based on race.

In repealing the PRA, the SAG also adopted a measure with the effect of preventing the racial classification or reclassification of any person in the future. The measure would also permit the continued use of the racial classifications in the population register in effect as of the date of the PRA's repeal until a new constitution enters into force. The only remaining uses of racial classifications in the population register would be to hold elections to fill vacancies in the racially-segregated Tricameral Parliament (and possibly a "white" referendum on a new constitution) and to implement its constitutionally-prescribed "own affairs" system, under which certain government functions such as education, pensions and social security are deemed to be the responsibility of the population group rather than the government as a whole.

Neither do we consider this measure to be for the "same purpose" as the PRA, within the meaning of section 311(a)(4). In setting the conditions for lifting sanctions in section 311(a), Congress did not include repeal or amendment of the South African constitution (which includes separate voters' rolls and the "own affairs" system). Had Congress intended to require constitutional changes, it could have done so easily in express terms. The language and legislative history of section 311 indicate that Congress sought to create an incentive for the SAG to take measures that would promote negotiations with the opposition, not a requirement that the SAG eradicate all aspects of apartheid before sanctions are terminated. Section 311(a)(5), for example, includes among the conditions for lifting sanctions that the SAG "agree" to enter into negotiations, not that the negotiations on a new constitution

have begun, much less have been completed. Similarly, section 311(a)(4) calls for repeal only of the GAA and PRA and includes no reference to other well-known apartheid legislation such as the Separate Amenities Act and Land Acts. Floor statements at the time of adoption of the CAAA strongly support this analysis of congressional intent.*

In sum, the "purpose" of the PRA was to regularize racial classification for a sweeping and comprehensive web of apartheid legislation. This was the reason for enactment of the PRA in 1950 and the way it was still being used when Congress passed the CAAA in 1986. Now, however, essentially all statutory apartheid -- including the Separate Amenities Act, the Land Acts, and the Group Areas Act -- has been repealed. Only the constitutionally-anchored elections by race and "own affairs" systems remain.

5. Section 311(a)(5)("agrees to enter into good faith negotiations with truly representative members of the black majority without preconditions")

The Government has expressed its desire and intention to enter without conditions into good faith negotiations with the opposition. Its actions bear this out. Discussions between

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* See, e.g., the following floor statements during the Senate debate of S. 2701 (which, with amendments, became the CAAA) at 132 Cong. Rec.: S11624 (Lugar, expressing hope that the conditions for lifting sanctions "will lead to good faith negotiations"), S11650 (Dodd, stating that the conditions represent "important steps in the right direction and signal [SAG] willingness to change course and pursue the path toward reform"), S11701 (Lugar, stating that if the SAG "moves to end apartheid and to change the constitutional framework, that ought to be recognized, it ought to be recognized promptly"), S11715 (a reprinted Sarbanes article, stating that "[i]f South Africa takes concrete steps toward dismantling the apartheid system ... the bill stipulates that the sanctions may be lifted"); and the statement by Representative Coats during the House floor debate of H.R. 4868 (identical to S. 2701 as passed by the Senate and enacted as the CAAA) at 132 Cong. Rec. H6781: "The incentives and sanctions work together to provide a carrot and stick approach. ... The incentives provided in the legislation are directed toward those very necessary first steps that the South African Government must take to end apartheid and bring about needed reform."

the Government and the ANC led to the breakthrough Pretoria Minute of August 6, 1990. This document provided for the suspension of violence and the release of political prisoners, as well as for subsequent negotiations on implementation. Once the Minute is fully implemented, the ANC's conditions for beginning full-fledged constitutional negotiations will have been met.

Conclusion

Accordingly, we conclude that the Government of South Africa has satisfied each of the conditions in section 311(a) of the CAAA for the termination of sanctions.